

Agenda Item: 9-4

Meeting Date: June 9 and 10, 2004

DIRECTOR'S REPORT

Budget

The Governor's May Revision to the Fiscal Year 2004-05 Budget proposes to reduce the California Bay-Delta Authority's budget by \$255,000 in addition to the \$2.4 million reduction proposed in January. Additionally, the May Revision included the following statement:

Since the CALFED Record of Decision (ROD) was adopted in 2000, over \$2.5 billion has been invested in water supply, water quality, and ecosystem restoration programs and projects in the 50 counties that depend on the Bay-Delta system for all or part of their water needs. Of the \$2.5 billion, \$1.7 billion has been contributed by the State. This amount is almost twice the proportionate share of State CALFED funding envisioned in the ROD. Federal and local agencies have not contributed comparable levels of funding. With the depletion of bond funding and diminished availability of general funds, the State can no longer afford to pay a disproportionate share for these programs.

The Administration will seek additional federal contributions and will support the enactment of a water user fee consistent with the 'beneficiary pays' principle of the ROD. This will ensure that important water supply, water quality, environmental, and levee stability programs continue and receive appropriate levels of funding from all partners in the CALFED effort.

The Assembly Budget Subcommittee on Natural Resources and Environmental Quality held its last hearing on the Authority's budget on May 20, 2004. The Subcommittee adopted the Governor's proposed General Fund reductions as well as the Proposition 50 and other bond funding proposals. Additionally, the Subcommittee adopted budget trailer bill language that expresses Legislative intent relating to user fees as follows:

The following subdivision is added to Water Code Section 79401.

(j) It is the intent of the Legislature that user fees be enacted relating to the CALFED Bay-Delta Program activities, adhering to beneficiary pays principles as supported by the Governor in the Governor's Budget May Revision, 2004-05.

The Senate Budget Subcommittee on Resources, Environmental Protection, Public Safety and Energy also held its last hearing on the Authority's budget on May 20, 2004. All General Fund reductions and Bond funding proposals were approved.

The Senate Subcommittee adopted budget trailer bill language to implement a broad-based user fee as follows:

It is the intent of the Legislature that water users that benefit from the implementation of the CALFED Record of Decision and the Bay-Delta Program shall be responsible for funding one half of the non-federal portion of those costs that provide general and shared benefits to users and to the public. This funding shall be in addition to costs that are charged to direct and identifiable beneficiaries of specific projects and programs.

79425. (a) The authority shall collect a fee annually from those agencies and persons diverting water from the Bay-Delta watershed, in an amount that is equal to one half the State CALFED Budget as defined in paragraph (c). These fees shall be adjusted to reflect any fees paid in the same year under other provisions of law or agreements if the authority finds that the revenues of those fees are applied to appropriate Bay-Delta Program activities.

(b) The fee imposed by this section shall be in proportion to the amount of water diverted except that the authority may develop an alternative formula that sets minimum diversion amount, and establishes such other criteria as are necessary for the effective and equitable implementation of this section.

(c) For the purpose of this section "State CALFED Budget" means the total amount of funds provided each year to the authority and the implementing agencies to achieve balanced implementation of the program's goals and objectives, including revenues from the fees identified in paragraph (a), but excluding federal funds, local agency cost share of projects, and costs charged to direct beneficiaries for projects implemented pursuant to this chapter.

(d) The Board shall transmit funds collected pursuant to this section, after deducting reasonable administrative costs, to the appropriate implementing agencies for expenditure.

The Senate Subcommittee also adopted budget trailer bill language relating to Proposition 50 expenditures as follows:

- WC 79509.5** (a) Pursuant to section 79509, the California Bay Delta Authority shall determine whether or not projects are consistent with the CALFED Programmatic Record of Decision.
- (b) Agencies responsible for financing projects that meet the conditions of (c) shall present the following to the California Bay Delta Authority for evaluation and approval.
- (1) Draft evaluation criteria.
 - (2) Proposed project awards.
- (c) Projects subject to this section are those that meet either of the following criteria:
- (1) The project is located within the CALFED solution area as defined in the CALFED Final Programmatic Environmental Impact Statement/Environmental Impact Report dated July 2000.
 - (2) The project wholly or partially assists in the fulfillment of one or more of the goals of the CALFED Bay-Delta Program.

Lastly, the Senate Subcommittee adopted supplemental report language relating to the Science Program as follows:

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- (a) The science program shall, by January 10, 2005, report to the Legislature with a plan to develop and implement a research agenda designed to answer the following questions:
- (1) How much additional water, above that provided under the current regulatory regimen, is necessary for the full recovery of all delta dependent fish species designated on either the state or federal endangered species lists as either endangered or threatened?
 - (2) What time of year is the additional water identified in (1) needed?
 - (3) Are there other characteristics of the additional water identified in (1), such as temperature, that are critical to recovery of these species, and if so what are those characteristics?
- (b) As part of the research agenda described in (a), the science program may address any other questions related to the water needs of threatened or endangered fish that the science program deems appropriate.

The Budget Trailer Bill language and the supplemental report language will likely be in Conference Committee assuming both houses adopt the subcommittee recommendations and send the differing trailer bills to conference.

Legislation

SB 1155 (Machado) passed the Senate Appropriations Committee on May 20, 2004 with author's amendments. The bill as amended makes legislative findings and would require the Director of the Department of Water Resources, in consultation with the Secretary of Interior, to develop and implement a program to meet all existing water quality standards and objectives for which the State Water Project has responsibility, either separately or jointly with the Federal Central Valley Project. The bill also would require the implementation program to be designed to achieve compliance with water quality standards prior to increasing exports. This bill will be eligible to be heard on the Senate Floor the week of May 24, 2004.

Federal Authorization – The U.S. Senate Committee on Energy and Natural Resources on April 28 unanimously approved S. 1097 by Senator Feinstein, which would provide Federal authorization for the CALFED Bay-Delta Program. The House version of the authorization bill, H.R. 2828 by Congressman Ken Calvert, was approved by the House Committee on Resources on May 5, 2004.

California Bay-Delta Program Litigation Update

A. New Environmental Water Account Litigation *California Farm Bureau Federation v. Chrisman, et al.*

Petitioners: California Farm Bureau Federation

Respondents: The Resources Agency (Resources), Environmental Protection Agency (CalEPA), Department of Food and Agriculture (CDFA), Department of Water Resources (DWR), Department of Fish and Game (DFG), Department of Health Services (DHS), California Bay-Delta Authority (Authority), and their respective directors in their official capacities.

Summary of Case: On April 16, 2004, the Farm Bureau filed a petition for writ of mandate in Sacramento Superior Court, challenging the legal sufficiency under California Environmental Quality Act (CEQA) of the CALFED Final 2004 Environmental Water Account (EWA) Environmental Impact Statement/Environmental Impact Report (EIS/EIR). The Farm Bureau is alleging, among other things, that the final EIS/EIR fails to: describe and evaluate significant impacts on agricultural resources; consider reasonable range of alternatives; describe and evaluate direct, indirect, and cumulative impacts and impacts to the food supply resulting from EWA water purchases; consider urban, commercial, and industrial growth-inducing impacts; describe and evaluate reasonable mitigation measures; and adequately respond to comments.

Current Status: A mandatory CEQA settlement conference is scheduled for May 27, 2004. The current deadline for DWR to certify and lodge the administrative record is August 18, 2004. No other dates are currently scheduled.

B. Programmatic Litigation

1. Federal Case

Laub v. Babbitt, et al., U.S. District Court, Fresno

Plaintiffs: California Farm Bureau Federation and several individual farmers

Defendants: All Federal and State agencies participating in the CALFED Program. The State agencies recently named in the Farm Bureau's latest complaint are sued via their executive officers: Governor Schwarzenegger; Michael Chrisman, Resources; Terry Tamminen, CalEPA; Celeste Cantu, State Water Resources Control Board (SWRCB); Lester Snow, DWR; Loris "Ryan" Broddrick, DFG; Peter Rabbon, The Reclamation Board (Rec. Bd.); Margit Aramburu, Delta Protection Commission (DPC); Darryl Young, Department of Conservation (DOC); Will Travis, Bay Conservation and Development Commission (BCDC); Sandra Shewry, DHS; and A.G. Kawamura, CDFA

Summary of Case: This case was filed in September 2000. It alleges that the CALFED Programmatic EIS/EIR (PEIS/EIR) violates National Environmental Policy Act (NEPA) and the Administrative Procedures Act. They seek an injunction against all State and Federal actions to implement the CALFED ROD until an adequate PEIS/EIR is prepared. The State defendants are apparently being sued under the theory that the Program is a joint Federal-State partnership that requires NEPA compliance under Federal law; and, therefore, the Federal government must comply with NEPA for all State projects, as well as Federal projects. The Farm Bureau alleged that the PEIS/EIR violated NEPA by improperly analyzing impacts to agricultural land and water and failed to contain an adequate alternatives analysis or mitigation measures to reduce impacts on agricultural land and water. The Farm Bureau also alleged other violations of NEPA, such as the claim that the June 9, 2000 policy document, *Framework for Action*, contained "significant new information" regarding the integrated storage investigation and the EWA that required defendants to recirculate the PEIS/EIR.

Current Status: The case is pending in the Federal district court. The district court dismissed an earlier version of the complaint as premature in August 2001. The Court of Appeals reversed that decision in September 2003. The Farm Bureau recently amended its complaint and an answer from all State defendants was filed on February 2, 2004. At a status conference held on January 20, 2004, a deadline of August 27, 2004 was set for the Federal defendants to file the administrative record. Discovery will be suspended until the record is filed. A subsequent status conference is scheduled for November 1, 2004 to determine how the case will proceed.

2. State Court Cases

Laub v. Schwarzenegger, et al., Court of Appeal, Third Appellate District (Sacramento)

Appellants/Plaintiffs: California Farm Bureau Federation and several individual farmers

Respondents/Defendants: Governor Schwarzenegger, Resources Agency Secretary Chrisman, CalEPA Secretary Tamminen

Summary of Case: The Farm Bureau filed this case in State court after the Federal district court dismissed a CEQA claim that had been part of their original NEPA lawsuit (described above). The Farm Bureau alleged that the PEIS/EIR violated CEQA by improperly analyzing impacts to agricultural land and water and failed to contain an adequate alternatives analysis or mitigation measures to reduce impacts on agricultural land and water. The Farm Bureau also alleged other violations of CEQA, such as the claim that the June 9, 2000 policy document, *Framework for Action*, contained "significant new information" regarding the integrated storage investigation and the EWA that required defendants to recirculate the PEIS/EIR.

Current Status: Defendants won on all issues in the trial court and the Farm Bureau appealed. That appeal has been consolidated with an appeal of the trial court's CEQA ruling, which was made jointly in Regional Council of Rural Counties (RCRC), described on the following page. On January 13, 2004, the Farm Bureau filed a brief seeking to overturn the Superior Court's ruling. The State's appellate briefs were filed on April 2, 2004. Reply briefs were filed May 10, 2004. No hearing has been set.

Regional Council of Rural Counties v. State, et al., Court of Appeal, Third Appellate District (Sacramento)

Appellants/Plaintiffs: Regional Council of Rural Counties, Central Delta Water Agency, South Delta Water Agency, Zuckerman-Mandeville, Inc., and individual farmers

Respondents/Defendants: State of California, The Resources Agency, Secretary of Resources, CalEPA, CalEPA Secretary (plus real parties in interest: Department of Water Resources, DWR Director, Department of Fish and Game, DFG Director, Patrick Wright [as Director of the CALFED Bay-Delta Program], and numerous Federal agencies and officers)

Summary of Case: Petitioners jointly filed this suit in Sacramento Superior Court and it was coordinated with *Laub v. Davis* (see Page 3), and the two cases have been consolidated on appeal. Petitioners argue that the PEIS/EIR

violated CEQA by, among other things, conducting an inadequate alternatives analysis, etc., relating to water supply and water quality issues in the Delta and watershed areas. Petitioners contend the ROD contained various new changes to water rights and water supply commitments that required recirculation of the PEIS/EIR. Petitioners also brought non-CEQA claims, contending that these provisions (as well as expenditures under the ROD) violated varied provisions of the Water Code.

Current Status: Defendants won on all issues in the trial court and petitioners appealed. On January 15, 2004, petitioners filed two briefs (one by RCRC and one for all other petitioners) seeking to overturn various rulings by the Superior Court. The State's appellate briefs were filed on April 2, 2004. Reply briefs were filed on May 15, 2004. No hearing has been set.

Municipal Water District of Orange County v. California Resources Agency, et al., (dismissed from Los Angeles Superior Court)

Petitioner: Municipal Water District of Orange County (MWDOC)

Defendant: California Resources Agency (plus real parties in interest CalEPA, Department of Fish and Game, DWR, SWRCB, CDFA, DPC, and Rec. Bd.)

Summary of Case: Petitioner alleged that the CALFED PEIR violates CEQA because it fails to include the June 9, 2000 policy document, *Framework for Action*, failed to analyze significant environmental effects of the program, and failed to discuss mitigation measures concerning water supply reliability and water quality for Delta exports to Southern California. Petitioners seek a judicial declaration that the *Framework for Action* is part of the CALFED preferred program alternative.

Current Status: This action was dismissed in 2001 pursuant to a settlement agreement reciting the contents of the ROD, the actions that defendants had taken and planned to take as of 2001 pursuant to the ROD related to scientific understanding on issues such as the interplay between Delta exports and certain listed fish species, and an agreement to give MWDOC notice of all stakeholder meetings.